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Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF ACTION FOR CHILDREN'S TELEVISION, AMERICAN CIVIL LIBERTIES UNION, CAPITAL CITIES/ABC, INC., CBS INC., INFINITY BROADCASTING CORPORATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PUBLIC RADIO, PEOPLE FOR THE AMERICAN WAY, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, AND TRIBUNE BROADCASTING COMPANY AS AMICI CURIAE IN SUPPORT OF APPELLANT/CROSS-APPELLEE

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BRIEF OF ACTION FOR CHILDREN'S TELEVISION, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLANT/CROSS-APPELLEE

INTEREST OF THE AMICI CURIAE [1]

The amici [2] are a group of commercial broadcasters, public broadcasters, cable interests, public interest

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[1] Written consent to the filing of this brief has been obtained from the parties to this case. The consent letters accompany this brief.

[2] The amici are listed on the cover of this brief. The lead amicus, Action for Children's Television, has participated in earlier Federal Communications Commission and court proceedings, seeking to im-

groups, and associations which represent broadcasters, journalists, program suppliers, listeners, and viewers.

Amici do not here challenge existing constitutional standards for regulating obscenity, which, the government urges, include "virtually all" of the material at issue here.[3] Nor do the amici offer so-called "dial-a-porn" services.

Amici address only the question of indecency regulation. The broadcast and cable amici offer news, public affairs, informational, artistic, and entertainment programming by conventional and cable television and radio. While the vast majority of such material would not be even arguably indecent under an appropriate standard, amici fear that some of this material may be deemed "indecent" under the broad standard recently adopted by the Federal Communications Commission (the "Commission").

Amici use various methods to aid parents in determining whether their children should have access to possibly indecent material. In broadcasting, this material generally is offered, if at all, in the evening hours when in most households parents are at home, so that they can supervise their children, and is preceded by warnings as to content.[4] In the cable medium, parents may decline to

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pose affirmative obligations on broadcasters to serve the child audience with educational and informational programming. Action for Children's Television opposes the statute here because it believes that parental responsibility and parental choice are critical in this area, and that government regulation should not reduce adults to the level of children in the name of protecting children.

[3] Brief for the Cross-Appellants/Appellees at 23 n.15 (hereinafter cited as "Gov't Br."). Accordingly, they take no position as to the validity of a national standard for judging obscenity, the issue raised in this case by Sable Communications of California, Inc. Amicus American Civil Liberties Union opposes any prohibitions on obscenity as a violation of the First Amendment; it does not view that issue as raised by the questions on which probable jurisdiction was noted.

[4] 18 U.S.C. § 1464 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication

subscribe to a particular service; cable companies also offer lockboxes for cable services.[5] Amici oppose any regulation of non-obscene communications that significantly reduces the availability of protected communications to adults or that replaces parental supervision with a government determination of what is fit for children.

Amici are concerned that if a total ban on indecent speech in the telephone medium were sustained, that ban would be urged as a predicate for equally indiscriminate sweeping bans on indecent speech in broadcasting, cable television, and other media as well.[6] Efforts to prohibit indecent speech have not been limited to telephone communications; they have extended to broadcasting, cable, and print. For example, an almost identical federal statute was recently adopted imposing a blanket ban on broadcast indecency,[7] which many of the amici are chal-

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shall be fined not more than $10,000 or imprisoned not more than two years, or both." As interpreted by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that statute allows the Commission to require time channeling for indecency. *See id.* at 750; *id.* at 757 (Powell, J., concurring).

[5] 47 U.S.C. § 544(d)(2)(A) provides that, "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

[6] This is not to suggest that the media are indistinguishable. There are a number of significant distinctions between this case and a prohibition on broadcast and cable indecency. Broadcasting and cable, unlike the telephone, are editorial media and offer a journalistic and artistic product rather than "telephone sex services," Gov't Br. at 28, which the government suggests uniformly appeal to the prurient interest, *id.* at 23 n.13. Also, this case involves the feasibility of a variety of blocking mechanisms in a medium where time channeling (as in broadcasting) and lockboxes (as in cable) appear to be an unsatisfactory method of assisting parental control. *See Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984) (setting aside regulation involving time-channeling for telephone medium).

[7] The statute requires that the Commission "promulgate regulations in accordance with section 1464, title 18, United States Code,

lenging as unconstitutional.[8] Blanket bans on indecent speech in the cable and print media have also been consistently held unconstitutional.[9]

The Court's decision in this case could have far-reaching effects on protected speech in these other media. Indecency is defined by the Commission to include a range of material with substantial social value. It applies to broadcasts concerning highly sensitive issues, such

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to enforce the provisions of such section on a 24 hour per day basis." Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2229 (1988). The Federal Communications Commission thereupon adopted, without notice or opportunity for public comment, a 24-hour-a-day ban on broadcast indecency. *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 457 (1988) (adding 47 C.F.R. § 73.3999).

[8] *Action for Children's Television v. FCC*, *petition for review filed*, No. 88-1916 (Dec. 30, 1988), *stay granted* (D.C. Cir. Jan. 23, 1989). Unlike most broadcast regulation, the Commission's regulation of broadcast indecency does not rest upon the spectrum scarcity rationale, which has been used to justify most content regulation of broadcasting. Under that rationale, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Both this Court in the original *Pacifica* decision, *see* 438 U.S. at 770 n.4 (Brennan, J., dissenting), and the Commission, *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 936 n.11 (1987), declined to rely on the spectrum scarcity theory to support the regulation, much less the prohibition, of broadcast indecency. Instead, the Commission's regulation of broadcast indecency rests on a wholly different theory—that in the broadcast medium parental supervision should be assisted because the medium is "uniquely accessible to children. . . ." *Pacifica*, 438 U.S. at 749.

Currently, there is litigation pending which raises questions as to the continued validity of the spectrum scarcity rationale for broadcast regulation, *see, e.g.*, *Syracuse Peace Council v. FCC*, No. 87-1516, slip op. (D.C. Cir. Feb. 10, 1989), and many of these amici have profound differences among themselves concerning those questions, which the Court need not reach here.

[9] *See* cases cited in note 33 *infra*.

as live news programs dealing with angry political demonstrations, informational programs about serious health issues like AIDS, and the broadcast of other news and public affairs programming involving those persons who, for whatever reason—cultural impoverishment, social disaffection, or the evolution of community mores—regularly and publicly use language which some consider offensive. The Commission's standard also extends to presentations of serious drama, motion pictures, modern dance, dramatizations of serious works of literature, and satirical material.[10] Amici believe that they could not realistically portray American society in the programs which they offer if they were effectively barred from including material deemed to be indecent because it is offensive to some. Amici believe that the Constitution does not require that political, social, and artistic representations be sanitized so that they are always fit for children, and that the First Amendment protects the important role of the media in mirroring both what is desirable and what is offensive in modern America.[11]

Amici believe that any blanket ban on indecent speech within any medium would not only prevent the presentation of material with substantial social value but, because of the vagueness and overbreadth of the definition of indecency, would also have a substantial chilling effect on the dissemination of material that is not indecent. Amici believe that such a ban violates the First Amendment rights not only of the producers and distributors of such materials but also of the adult audiences that they serve.

SUMMARY OF ARGUMENT

Section 223(b) is unconstitutional because it totally bans protected speech. Under current law, obscenity is not protected, but this Court has repeatedly made clear that the First Amendment protects indecent, non-obscene speech. It is equally clear that government cannot impose

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[10] *See* page 28 *infra*.

[11] As this Court noted in *Cohen v. California*, 403 U.S. 15, 25 (1971), "one man's vulgarity is another's lyric."

a blanket ban on protected speech and thus "reduce the adult population" to seeing and hearing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Congress' determination that a total ban is necessary cannot prevent this Court from examining the strength and legitimacy of the asserted governmental interest.

In fact, this statute rests on an impermissible governmental objective. The government's sole legitimate interest in regulating indecent speech is, at most, to assist parents in supervising their children, not to supersede parental authority entirely. A variety of mechanisms are available to assist such parental supervision. Thus, in broadcasting, indecency may be regulated through channeling broadcasts to hours when most parents are able to supervise their children; in cable, parents must initially choose to subscribe to a particular service, and, if they choose to subscribe, may use lockboxes to screen material they believe their children should not watch; and in print, the sale of indecent materials to minors may be barred because that bar does not block adult access to the material. In the telephone medium, blocking devices, scrambling, and access codes promote the same goal of parental choice. However, the government cannot go so far as to ban adult access entirely, as prior cases have uniformly held.

The indecency standard incorporated by the statute is also unconstitutionally vague and overbroad. The Commission has ruled that it will apply in the telephone context the same generic definition of indecency that it now applies in broadcasting. In contrast to the prevailing rule with respect to obscenity, the serious literary, artistic, political, and scientific value of the speech does not bar a finding that it is indecent. Nor is it necessary that the material appeal to the prurient interest. The Commission has declined to provide any meaningful illumination of this standard, but has left electronic publishers to interpret it at their peril. The vagueness and overbreadth of this standard chills speech that is fully pro-

tected by the First Amendment, including news, public affairs, information, drama, satire, and artistic expression of great value to the adult audience.

ARGUMENT

INTRODUCTION

Before the blanket ban on telephone indecency (the "Bliley-Helms Amendment")[12] was enacted, the Commission sought to regulate indecency in the telephone medium through the use of access codes, scrambling, blocking devices, and other mechanisms that facilitate parental choice.[13] Despite the existence of these mechanisms, Congress in April 1988 imposed a blanket ban on the dissemination of telephone indecency, and thereafter took the same action for the broadcast medium.[14] These amici urge that the blanket ban on telephone indecency, like any other blanket ban on indecent speech, is unconstitutional both because it totally bans protected speech and because the definition of indecency is unconstitutionally overbroad and vague.[15]

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[12] Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 423 (1988).

[13] The permissibility and adequacy of these various regulations have been extensively litigated. *See Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.) (upholding regulations involving access codes, scrambling, and credit card payments insofar as they concerned obscenity), *cert. denied*, 109 S. Ct. 305 (1988); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (setting aside regulation involving access codes with respect to the New York Telephone Company system because there was no evidence that access codes were technically feasible on that system and were the least restrictive means to limit minors' access); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (setting aside regulation involving time channeling and credit card payments).

[14] *See* note 7 *supra*.

[15] This brief does not address the question whether *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), was correctly decided. In this connection, we note that the Second Circuit has held that no regulation of indecency is permissible in the telephone medium,

I. INDECENT SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

Although the government does not say so explicitly, the premise of its argument supporting the ban on indecent telephone speech is that the First Amendment does not protect indecency.[16] In this respect, the government's argument is fatally flawed. Under current law, the First Amendment does not protect obscene speech.[17] But it has long been clear that 'indecent," non-obscene speech is protected.

This Court has repeatedly recognized that the protections of the First Amendment extend to indecency. For example, in *Bantam Books, Inc. v. Sullivan*, the Court held unconstitutional a state law regulating indecent and other speech "manifestly tending to [contribute] to the corruption of the youth" because the law "provide[d] no safeguards whatever against the suppression of non-obscene, and therefore *constitutionally protected*, matter." [18] In *Cohen v. California*, this Court invalidated a conviction imposed for wearing a jacket bearing a four-letter word in a courthouse corridor because the speech was protected and could not be suppressed.[19] More recently, in *Bolger v. Youngs Drug Products Corp.*, the Court invalidated a ban on mailing advertisements for contraceptives, holding that the material was protected and that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable

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even that designed to aid parental supervision. *Carlin Communications, Inc.*, 837 F.2d at 558-60. This question need not be reached here to invalidate the present legislation.

[16] *See* Gov't Br. at 25. That position is taken explicitly by a number of the amici supporting the government. *See* Brief of Morality In Media, Inc. as Amicus Curiae at 10-16; Brief Amici Curiae of Citizens for Decency Through Law, Inc., *et al.* at 7-17.

[17] *Miller v. California*, 413 U.S. 15, 23 (1973).

[18] 372 U.S. 58, 70 (1963) (emphasis supplied).

[19] 403 U.S. 15 (1971).

for a sandbox." [20] Only last term in *Hustler Magazine v. Falwell*, the Court unanimously held that an offensive political cartoon using sexual innuendo was protected by the First Amendment.[21]

In *FCC v. Pacifica Foundation*,[22] upon which the government places primary reliance,[23] this Court, while sustaining channeling, also held that the First Amendment protects indecent broadcasts. In his dissent, Justice Brennan commented on the Court's "unanimous agreement that the Carlin monologue is protected speech." [24] In his plurality opinion, Justice Stevens noted that indecent speech, while subject to channeling in the broadcast medium, is "not entirely outside the protection of the First Amendment." [25] And in his concurrence, Justice Powell explicitly stated his view that the First Amendment protects indecent speech. He noted that, except in the context of commercial speech, the Court is not "free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." [26]

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[20] 463 U.S. 60, 74 (1983).

[21] 108 S. Ct. 876 (1988). As this Court has noted:

> The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam).

[22] 438 U.S. 726 (1978).

[23] *See* Gov't Br. at 25.

[24] *Pacifica*, 438 U.S. at 763 (Brennan, J., dissenting).

[25] *Id.* at 746 (plurality opinion).

[26] *Id.* at 761 & n.3 (Powell, J., concurring).

The courts of appeals and the Commission, like the district court here, have repeatedly reaffirmed that holding. In *Action for Children's Television v. FCC* ("*ACT*"), the District of Columbia Circuit concluded that "[b]roadcast material that is indecent but not obscene is protected by the first amendment. . . ."[27] The Eleventh Circuit in the cable television area[28] and the Second Circuit in the telephone context[29] have also explicitly held that indecent speech is protected. The Commission has conceded that indecent speech is protected by the First Amendment, both in litigation[30] and in congressional testimony which recognized that "this type of speech . . . is entitled to First Amendment protection."[31]

II. A BLANKET BAN ON INDECENT SPEECH IS UNCONSTITUTIONAL.

Just as it is clear that indecent speech is constitutionally protected, for more than a quarter of a century it has been established that government cannot impose a blanket ban on such speech and thus "reduce the adult

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[27] 852 F.2d 1332, 1344 (D.C. Cir. 1988).

[28] *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *see also Wilkinson v. Jones*, 430 U.S. 986 (1987) (mem.), *aff'g*, 800 F.2d 980 (10th Cir.) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1106-17 (D. Utah 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

[29] *Carlin Communications, Inc.*, 837 F.2d at 552-60.

[30] *See, e.g.*, FCC's Opposition to "Motion for Stay and for Expedited Consideration," *Action for Children's Television v. FCC*, No. 88-1918, at 9 (D.C. Cir. filed Jan. 11, 1989).

[31] *Telephone Decency Act of 1987: Hearings on H.R. 1700 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 211 (1987) (testimony of FCC General Counsel) ("*1987 Hearings*"); *see also Harriscope of Chicago, Inc.*, 65 Rad. Reg. 2d (P&F) 1512, 1518 (1989).

population" to seeing or hearing "only what is fit for children."[23] Every single decision of which we are aware in broadcasting, cable, telephone, and print has concluded that blanket bans on indecency violate the First Amendment.[24] Under the Constitution, censorship is an impermissible response to speech that is deemed offensive.

The government has cited no case to the contrary, but argues for a change in this Court's jurisprudence on the grounds that "substantial deference" is due to Congress' determination that a ban is necessary,[25] and that the statute should be sustained "based on the determinations that Congress made in enacting it."[26]

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[23] *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957); *accord Bolger*, 463 U.S. at 73-74; *see also Hustler Magazine* v. *Falwell*, 108 S. Ct. 876 (1988); *Cohen* v. *California*, 403 U.S. 15 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

[24] *See, e.g., Wilkinson* v. *Jones*, 430 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 980 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (mail); *Butler* v. *Michigan*, 352 U.S. 380 (1957) (print); *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343 n.13 (D.C. Cir. 1988) ("*ACT*") (broadcasting); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S. Ct. 305 (1988) (telephone); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (print); *Bushin* v. *Town of Ashburnham*, 622 F. Supp. 900 (D. Mass. 1985) (print); *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

[25] Gov't Br. at 25.

[26] *Id.* at 23-23 n.14.

The cases cited by the government do not support its argument.[36] Ever since *Marbury v. Madison*,[37] this Court has made clear that the courts must independently interpret the Constitution. Nor is a congressional determination as to the need for legislation to be given weight where the government seeks to suppress speech under the First Amendment. This rule dates back to Justice Brandeis' concurrence in *Whitney v. California*.[38] Addressing a statute barring the advocacy of criminal syndicalism, Justice Brandeis stated that:

> This legislative declaration . . . does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was

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[36] The government's cases are not remotely on point. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12 (1985) (upholding statutory limitation on attorneys' fees in benefit cases before the Veterans' Administration, and noting that in reaching that conclusion the Court "need not rely on" Congress' findings on the question); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (sustaining statute excluding women from registering for the draft as not a violation of due process, relying on congressional findings because of "Congress' authority over national defense and military affairs").

Ginsberg v. New York, 390 U.S. 629 (1968), does not hold that deference to legislative judgments is appropriate in First Amendment cases. That case held only that, because "obscenity is not protected expression," sustaining the statute at issue there "require[d] only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641.

[37] 5 U.S. (1 Cranch) 137 (1803).

[38] 274 U.S. 357 (1927) (Brandeis, J., joined by Holmes, J., concurring).

> one so substantial as to justify the stringent restriction interposed by the legislature.[39]

The Supreme Court has reaffirmed the rule in more recent cases. In *Landmark Communications, Inc. v. Virginia*, the Court stated that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake," [40] and explained that "[w]ere it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." [41]

In any event, Congress has made no finding in enacting the blanket ban on telephone indecency that such a ban is necessary to achieve a constitutional objective. The primary focus of the legislative history of the Bliley-Helms Amendment insofar as it concerns indecency was the desire to prevent all children from hearing material deemed to be "indecent." [42] That is not a legitimate governmental objective.

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[39] *Id.* at 378-79 (Brandeis, J., joined by Holmes, J., concurring).

[40] 435 U.S. 829, 843 (1978).

[41] *Id.* at 844; *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984) (in First Amendment cases, the Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"). In the broadcast medium, courts pay close attention to what Congress has done, but are not required to defer to congressional judgments. *See, e.g., Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973).

[42] *See, e.g.*, 134 Cong. Rec. H1690-91 (daily ed. Apr. 19, 1988) (remarks of Rep. Bliley); 133 Cong. Rec. S16,794-96 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms).

In the area of indecency, the only arguably legitimate governmental purpose is to aid parents in supervising their children. This Court has noted that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." [43] In the broadcast medium, that purpose is achieved by the channeling of indecent speech to protect "*unsupervised* children." [44] The government's role is thus limited to "facilitat[ing] parental supervision of children's listening." [45]

In cable too, the sole government interest lies at most in assisting parents in supervising their children. The cases have emphasized the parental manageability of cable television, explaining that:

> [P]arents must decide whether to allow Cablevision into the home. Parents decide whether to select supplementary programming services. . . . Those services publish programming guides which identify programs containing "vulgarity," "nudity," and "violence." Additionally, parents may obtain a "lockbox" or "parental key" device enabling parents to prevent children from gaining access to "objectionable" channels of programming.[46]

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[43] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Bolger*, 463 U.S. at 73-75.

[44] *Pacifica*, 438 U.S. at 757 (Powell, J., concurring) (emphasis supplied). While this Court in *Pacifica* relied in part on the argument that adults should also be protected from indecent material, 438 U.S. at 748-49, the Court has since disavowed this rationale, *see Bolger*, 463 U.S. at 71-72. In *Pacifica*, Justice Powell relied heavily on Judge Leventhal's thoughtful dissenting opinion in the court of appeals, 438 U.S. at 757 n.1 (Powell, J. concurring), which likewise turned on the assumption that channeling is appropriate to enable adult supervision, *Pacifica Found. v. FCC*, 556 F.2d 9, 32-36 (D.C. Cir. 1977) (Leventhal, J., dissenting). Judge Leventhal concluded that the Commission could "assist parents in their protection of young children." *Id.* at 37 (Leventhal, J., dissenting).

[45] *ACT*, 852 F.2d at 1343.

[46] *Cruz*, 755 F.2d at 1420; *see also Community Television of Utah, Inc.*, 555 F. Supp. at 1172 (noting "the responsibility of a parent to oversee the development of his child").

In cable, courts have also made clear that "parents [must be allowed] to provide materials for their children that the children themselves cannot purchase . . . ." [47]

So too, in reviewing statutes regulating the display of books and magazines, this Court has consistently reaffirmed the role of parental choice. In *Ginsberg v. New York*,[48] the opinion made clear that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." [49] Explaining that laws prohibiting the distribution to minors of material that is obscene as to them "aid discharge" of parents' "primary responsibility for children's well-being," [50] the Court went on to note approvingly that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." [51]

The authorities have consistently rejected a blanket ban as neither necessary nor appropriate to aid parental supervision.[52] The government has not shown why the fundamental role of parents in making choices for their children, and in deciding how to raise their children, is suddenly rendered irrelevant when the medium is the telephone instead of broadcasting, cable, or print.

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[47] *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1115 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'd*, 480 U.S. 926 (1987) (mem.).

[48] 390 U.S. 629 (1968).

[49] *Id.* at 639.

[50] *Id.*

[51] *Id.* We note that parental choice is also facilitated in movie theaters through the movie ratings system.

[52] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), does not support a contrary view, since the holding in that case rests on the need for school officials to prevent disruption of the school's educational mission by indecent speech.

In seeking to justify the blanket ban, the government suggests that Congress did act to support the role of parental choice, and relies on a supposed congressional determination that a total ban was necessary for that purpose.[53] As we have already noted, such a congressional finding would be entitled to no weight in the First Amendment area,[54] and in fact no such finding was made here. There appears to be only a single sentence in the legislative history addressing the question whether parental supervision is sufficient. It appears in a legal memorandum submitted by Citizens for Decency Through Law which urged that it was a "virtual impossibility for parents to monitor [telephone] use." [55] The government nonetheless attempts to suggest that there was a congressional finding that "neither access codes nor scrambling nor any other device so far developed can enable parents to prevent children's access." [56] The government thus seeks to craft an elaborate and wholly speculative rationale for totally banning indecent material to support parental choice.

There are a range of approaches to aiding parental choice. The government is at a loss to explain why blocking devices, scrambling, and access codes,[57] like channel-

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[53] Gov't Br. at 29-30.

[54] *See* pages 12-13 *supra*.

[55] 134 Cong. Rec. S4381 (daily ed. Apr. 20, 1988) (legal memorandum of Citizens for Decency Through Law) (footnote omitted). The record also contains statements that children had secured access. *See, e.g.*, 133 Cong. Rec. S16,794-95 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms). There is no suggestion that they did so in circumstances where blocking, access codes, or scrambling had been used to prevent it.

[56] Gov't Br. at 30.

[57] The Commission has specifically ruled that scrambling is an "effective alternative method" of restricting minors' access to telephone services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2714, 2720, *stay denied*, 2 FCC Rcd 3672 (1987), *aff'd sub nom. Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S. Ct. 305 (1988). The Commission also approved

ling in broadcasting, subscriptions and lockboxes in cable, and prohibitions on the sale of printed materials to minors, do not allow parents to prevent their children from having access to indecent telephone messages at home if the parents choose to do so.[58]

However, the government urges that some "'enterprising minors'"[59] could evade their parents' determination to deny access to indecent telephone services by visiting a home at which parents had made a contrary determination.[60] But this argument is equally applicable to every other medium of communications. A child whose parents had determined not to buy a particular publication, not to subscribe to (or to lock out) a particular cable service, or not to permit the viewing of a particular television or radio program could visit a home where the parents had made a contrary decision. Thus, the government's argument here amounts to nothing less than an argument that speech characterized as "indecent" can be denied entirely to the adult audience in *every* medium of communications because of the possibility that some limited number of children, contrary to their parents' wishes and directions, could secure access to it. This theory wholly loses sight of the importance of preserving adult access to protected material.

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requiring message providers to implement an access code system, under which codes would be assigned only after an individual has submitted a written application containing proof that he is an adult. *Id.* at 2715, 2720. The Commission earlier approved prepayment by credit card as well. *Id.* at 2715. This case does not present issues as to the permissibility or feasibility of requiring particular mechanisms.

[58] Gov't Br. at 30.

[59] *Id.* at 10, 35 (quoting *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 50 Fed. Reg. 42,699, 42,706 n.54 (1985), *rev'd, Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986)).

[60] If blocking mechanisms are in place, such material would not be available from pay telephones.

As we have indicated,[61] the courts have consistently rejected this position and invalidated blanket bans, and this Court has done so explicitly in the *Bolger*[62] and *Butler*[63] cases. While the government is correct that *Pacifica* did not directly decide the specific question of whether a "safe harbor" was constitutionally required,[64] *Pacifica* approved only the Commission's notion of channeling broadcast speech.[65] The necessary implication of the Court's conclusion that indecency is protected speech is that a blanket ban is unconstitutional. Similarly, in those limited areas where other regulation of indecent speech has been permitted, this Court has approved it only where it did not have the "effect of suppressing, or greatly restricting access to, lawful speech" within the particular medium.[66]

Until now, this has been the view of those charged with enforcing the statute as well. In stark contrast to their present position, both the Commission and the Department of Justice in the past repeatedly emphasized that a blanket ban on indecent speech would be unconstitutional. In rejecting a proposal for an absolute ban on broadcast indecency, the Commission stated:

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[61] *See* page 11 *supra*.

[62] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *see also Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (upholding statute under which a person offended by advertisements sent through the mail can require that the mailer cease mailing such advertising so as not to "risk that offensive material come into the hands of his children").

[63] *Butler v. Michigan*, 352 U.S. 380 (1957).

[64] *Pacifica*, 438 U.S. at 750 n.28.

[65] *Id.* at 750; *id.* at 757 (Powell, J., concurring).

[66] *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 71 n.35 (1976) (plurality opinion); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 74 (1981).

> The unqualified reading of Section 1464 pressed by [Morality In Media], under which the broadcast of indecent material would be prohibited altogether would, we believe, run afoul of this constitutional premise.[67]

Testifying in 1987, the FCC's General Counsel emphasized that "legal precedent suggests that government regulation in this area cannot go so far as to altogether ban its dissemination to consenting adults." [68] Thereafter, in response to written questions from Congressman Thomas J. Bliley, Jr., the sponsor of the legislation, she noted that "in both broadcasting and dial-a-porn services, the Commission has consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*." [69] So too, the spokesman for the Department of Justice testified that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts." [70] President Reagan, in a signing statement accompanying the legislation, also noted that "current Supreme Court jurisprudence is unfriendly to parts of this bill." [71]

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[67] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 931 (1987) (footnotes omitted) (emphasis supplied), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[68] *1987 Hearings* at 212 (testimony of FCC General Counsel); *see also Cable-Porn and Dial-a-Porn Control Act: Hearing on S. 1090 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 16 (1985).

[69] *1987 Hearings* at 246 (letter from FCC General Counsel); *see also id.* at 255 ("any attempts to prohibit consenting adults from receiving indecent but not obscene speech would be unconstitutional) (letter from FCC General Counsel).

[70] *Id.* at 258 (letter from U.S. Attorney Brent D. Ward).

[71] Remarks on Signing the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, 24 *Weekly Comp. Pres. Doc.* 541 (Apr. 28, 1988).

It is no answer to suggest, as the government tries to do in its brief, that because "[a]dults remain free to purchase recordings containing the identical messages at book or record stores," [72] they are not denied access to this material. If a blanket ban is constitutional in one medium, the government would no doubt argue that it would be valid in other media as well. In any event, the Court made clear long ago that free speech may not be "abridged on the plea that it may be exercised in some other place." [73] Nor is it an answer to suggest that adult access is not denied because messages conveyed through the use of indecent speech can instead be conveyed through the use of less offensive speech.[74] This Court made clear in *Cohen v. California* that many messages cannot in fact be conveyed in different words or forms because "words are often chosen as much for their emotive as their cognitive force." [75] It concluded that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." [76]

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[72] Gov't Br. at 34.

[73] *Schneider v. State*, 308 U.S. 147, 163 (1939); *see also Bolger*, 463 U.S. at 69-70 n.18; *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980). Although the Court in *Pacifica* noted that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words," 438 U.S. at 750 n.28, the Court was obviously referring to the broadcast of prerecorded material. Large quantities of material that may be deemed to be indecent but that may not be prerecorded —such as original programming and news—are available only through the free medium of broadcasting. That people may be able to purchase different "offensive" material elsewhere is therefore constitutionally irrelevant.

[74] Gov't Br. at 25 n.16 (quoting *Pacifica*, 438 U.S. at 743 n.18 (plurality opinion)).

[75] 403 U.S. 15, 26 (1971).

[76] *Id.*; *see also San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2978 (1987). In Justice

In short, indecent speech cannot be treated as though it were the equivalent of obscenity and banned entirely.

III. THE TERM "INDECENT" IN SECTION 223(b) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

If this Court were to invalidate the blanket ban on indecent telephone communications, it would not need to reach the questions concerning the Commission's underlying indecency enforcement standard. If this Court does reach that issue, we urge that the Commission's indecency enforcement standard is unconstitutionally vague and overbroad.

The Supreme Court has repeatedly held that laws seeking to regulate speech on the basis of its content must be clear and precise so that those subject to regulation are given adequate notice, and so that the regulation does not cause speakers to " 'steer far wider of the unlawful zone.' " [77] "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." [78] Precision is especially important where, as here, criminal sanctions may be imposed for violation of the statute.[79]

Stevens' plurality opinion in *Pacifica*, he stated "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18 (plurality opinion). This would appear to be directly contrary to the Court's holding in *Cohen*. In any event, the current indecency ban goes much further than a ban on the repetitive use of the "seven dirty words."

[77] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[78] *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

[79] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Papachristou v. City of Jack-*

So far as we are aware, none of the federal statutes prohibiting indecent speech has ever contained any definition of indecency,[80] and there is no commonly accepted definition of that term. Federal court decisions before *Pacifica* struggled with the interpretation of the term "indecent," but none of them articulated a separate definition of indecency.[81] Indeed, before *Pacifica* the Commission agreed that " 'indecency' in 18 U.S.C. § 1464 had never been construed authoritatively by the federal courts. . . ." [82]

Like Congress and the courts, the Commission has had substantial difficulty defining indecency. Before 1975, in applying Section 1464, the Commission articulated a definition of indecency as material that "is patently offensive by contemporary community standards and utterly without redeeming social value," [83] a definition quite similar to the definition of obscenity except that appeal to the prurient interest was not required. In the 1975 *Pacifica* case, the Commission articulated a new, and seemingly broader, definition of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast

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sonville, 405 U.S. 156, 162 (1972). We note that the Court in *Pacifica* expressly declined to "consider any question relating to the possible application of § 1464 as a criminal statute." 438 U.S. at 739 n.13; *see also id.* at 747 n.25 (plurality opinion); *id.* at 750.

[80] *See, e.g.*, 18 U.S.C. § 1464; 47 U.S.C. § 223(b). The term "indecent" in other federal statutes has been construed to be the same as "obscene." *See Hamling v. United States*, 418 U.S. 87, 110-16 (1974); *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 130 n.7 (1973); *Roth v. United States*, 354 U.S. 476, 491 (1957).

[81] *See, e.g., United States v. Simpson*, 561 F.2d 23 (7th Cir. 1977); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720, 725-26 (9th Cir. 1966).

[82] Brief for Petitioner at 22, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *see Citizens Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 97 (1975).

[83] *Eastern Educ. Radio (WUHY-FM)*, 24 F.C.C.2d 408, 413 (1970).

medium, sexual or excretory activities and organs. . . ." [84] The existence of "social value" was no longer sufficient to render the material not indecent. On review, the court of appeals found that definition to be unconstitutionally vague and overbroad.[85]

The Supreme Court did not reach this question or approve the broad standard articulated by the Commission, but only its application to the particular broadcast —a George Carlin monologue involving repeated use of the "seven dirty words." [86] Justice Stevens noted for the majority that the " 'Court . . . reviews judgments, not statements in opinions.' " [87] He went on to explain that in the Commission's opinion "questions concerning possible action in other contexts were expressly reserved for the future," [88] and he declined to consider the broader question of the constitutionality of the standard.[89] In his plurality opinion, he stated that the Court's "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." [90] And Justice Powell agreed in a separate concurring opinion that the Court has appropriately refused to consider the overbreadth challenge because "the Commission's order was limited to the facts of this case." [91] In the Commis-

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[84] *Pacifica*, 56 F.C.C.2d at 98.

[85] *Pacifica*, 556 F.2d 9 (D.C. Cir. 1977).

[86] *Pacifica*, 438 U.S. at 742-43 (plurality opinion).

[87] *Id.* at 734 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

[88] *Id.*

[89] *Id.* at 742-43 (plurality opinion). The Commission urged that the Court need not pass on the constitutionality of its generic definition because the Commission had addressed only the limited question of whether the particular broadcast was indecent and had not passed on the question of whether other material cited by the broadcasters in the case would be considered to be indecent. *See* Brief for Petitioner at 41-48, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

[90] *Pacifica*, 438 U.S. at 742 (plurality opinion).

[91] *Id.* at 761 n.4 (Powell, J., concurring); *see also id.* at 755-56 (Powell, J., concurring).

sion rulings that followed over the next decade, the agency adopted a narrow construction of its 1975 standard, limiting it to material similar to the Carlin monologue.[92]

In sharp contrast to this limited approach, the Commission in 1987 determined to regulate indecency more broadly.[93] While purporting to adhere to the "patently offensive" definition articulated in the Commission's 1975 *Pacifica* decision, it effectively articulated a new standard, and made clear that it will no longer confine indecency to the repetitive use of the "seven dirty words." The Commission also warned broadcasters generally that they must interpret and apply its broad new standard or face the possibility of sanctions, including the denial of license renewal.[94]

The Commission has made clear that it intends to apply this generic definition to telephone indecency as well. On June 1, 1987, barely one month after articulating the definition in the broadcasting area, the FCC's General Counsel reiterated that the Commission would apply the broadcast standard in the telephone context. She stated that while the "definition of indecency was developed in the broadcast context," [95] the Commission

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[92] *See, e.g., Pacifica Found.*, 95 F.C.C.2d 750 (1983) (finding morning announcer's use of several of "seven dirty words" not to be indecent; *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978) (finding not to be indecent television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, profanity, and sacrilege"); *see also Decency in Broadcasting, Inc.*, 94 F.C.C.2d 1162 (1983).

[93] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930 (1987).

[94] The failure to comply with Commission requirements always presents the risk of loss of license and a ban on all further publication, a penalty which cannot be imposed on any other publisher.

[95] *1987 Hearings* at 211 (testimony of FCC General Counsel); *see also Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 3672, 3673-74 (1987) (indicating that broadcast definition would be applied).

has "been using this definition in determining which dial-it messages appear to be indecent under current Section 223." [96]

Congress in enacting the Bliley-Helms Amendment also apparently contemplated use of this expanded indecency standard. Senator Helms, sponsor of the 1988 amendment in the Senate, made clear that the Commission's new interpretation of the broadcast indecency standard was to continue to govern,[97] and subsequent to the enactment of the amendment, the Commission has continued to apply its broadcast definition in the telephone context.[98]

On its face and stripped of the earlier construction which limited the standard to repetitive use of the "seven dirty words," the definition of indecency is inherently unclear. The Commission's various opinions in this matter have only added to the confusion. Purporting to provide guidance, the Commission has stated that material must not be " 'vulgar' or 'shocking,' " that "the manner in which the language or depictions are portrayed" is important,[99] that "material [that is] isolated or fleeting" may be acceptable,[100] and that indecency "requires careful consideration of context." [101]

The problem of vagueness has been seriously compounded by the Commission's specific statements that two

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[96] *1987 Hearings* at 212 (testimony of FCC General Counsel).

[97] 133 Cong. Rec. S16,794 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms).

[98] Citing its 1987 broadcast decisions, the Commission has explained that it "believe[s] that the legislative history reveals that Congress intended the term 'indecent' to be defined as that term was defined in an analogous context in 18 U.S.C. § 1464." *Intercambio, Inc.*, 64 Rad. Reg. 2d (P&F) 1663, 1678 (1988) (footnote omitted); *accord Audio Enterprises, Inc.*, 64 Rad. Reg. 2d (P&F) 1681, 1695 (1988).

[99] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932 (footnote omitted).

[100] *Id.* (footnote omitted).

[101] *Id.* (footnote omitted).

prongs of the *Miller* standard for obscenity have been made inapplicable.[102] Thus, the material need not appeal to the prurient interest and, most important, it may still be deemed indecent even though it has serious literary, artistic, political, or scientific value. The Commission's inability to define the role of serious merit has been particularly troublesome. The Commission has stated that serious merit "is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables." [103] The significance of "serious merit" is not further explained, nor are parties informed of what the other variables are. The Commission's interpretation is all the more confusing because it casts doubt on the very materials that the Commission once approved and on the rulings that broadcasters have been relying on for guidance for years.[104]

Indeed, the Commission appears to have concluded that it is simply impossible to provide meaningful guidance as to this shifting and elusive standard. The Commission stated that the term "patently offensive" must be 'construe[ed] . . . with reference to specific facts," [105] that "its meaning can only be given greater specificity on a case-by-case basis," [106] and that "we cannot list any particular language or material that will always be found indecent." [107] Yet, the Commission has directed those

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[102] *See 1987 Hearings* at 211 (testimony of FCC General Counsel). As the FCC's General Counsel testified in the course of the legislative history:

> [I]ndecency is essentially sexually explicit speech that need satisfy only the second prong of the three prong obscenity test; that is, it need not appeal to the prurient interest nor lack social, artistic, political or scientific value.

[103] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932.

[104] *See* cases cited in note 92 *supra*.

[105] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932.

[106] *Id.*

[107] *Id.* at 937 n.28.

subject to its regulation to interpret and apply the new standard:

> They must apply a generic definition with reference to the guidance provided by existing case law on the matter. [They] may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.[108]

The Commission has acknowledged that the task confronting broadcasters in particular is not an "easy one" given the lack of an accepted definition or further guidance from the Commission.[109] It is readily apparent, as the District of Columbia Circuit found in *ACT*, that "vagueness is inherent" in this definition of indecency.[110] The Commission has thus failed to provide adequate guidance as to the meaning of indecency and has rendered "principled review" by the courts impossible.[111]

Despite the government's suggestion that the burden of this vagueness will fall on pornography,[112] the burden in fact will fall heavily on protected speech.[113] The Commission has stated specifically that the indecency ban applies to the broadcast of news programs.[114] And the

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[108] *Id.* at 932.

[109] *Id.* at 933.

[110] 852 F.2d at 1344. That court held (we believe incorrectly) that this Court's decision in *Pacifica* prevented it from ruling that the Commission's standard is unconstitutionally vague, and "welcome[d] correction" from "Higher Authority." *Id.* at 1339.

[111] *Compare Meredith Corp. v. FCC*, 809 F.2d 863, 871 n.9 (D.C. Cir. 1987) ("[W]e note our reluctance as a prudential matter to delve into [Commission] determinations that do not readily lend themselves to principled review".).

[112] *See* Gov't Br. at 33.

[113] This is in direct contrast to the Commission's earlier limited application of the standard to the repetitive use of the seven dirty words, which this Court found would deter "only the broadcasting of patently offensive references to excretory and sexual organs and activities." *Pacifica*, 438 U.S. at 743 (plurality opinion) (footnote omitted).

[114] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 937 n.31.

Commission's indecency cases have involved a range of material, including social satire,[115] political advertising,[116] informational programs,[117] classic works of literature,[118] modern drama addressing social issues,[119] and motion pictures.[120] To be sure, not all of these cases resulted in a ruling that the material was indecent within the meaning of Section 1464. But even in those cases in which the Commission ruled that the material was not indecent, its rulings had a particularly grudging quality and were unlikely to give much clarity or comfort to those attempting to construe the definition in similar situations.

The Commission's finding that the broadcast of excerpts from *Ulysses* would not be indecent exemplifies the approach. The Commission stated only that "we would not expect that the Commission would find such references, dispersed as they would have been throughout the three-hour reading of this work of literature, to be patently offensive." [121] It affords amici and others little prac-

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[115] *See, e.g., Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (Howard Stern morning radio program), *reconsideration and clarification granted in part, denied in part*, 3 FCC Rcd 930 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[116] *See, e.g.*, Letter to Hon. John E. Bourne, Jr. from Chief, Mass Media Bureau (Apr. 7, 1988) (political advertisement containing the word "clocksucker" in reference to the local mayor's desire to purchase a clock for City Hall).

[117] *See, e.g.*, Letter to Mr. and Mrs. Roland Orle from Chief, Mass Media Bureau (Apr. 7, 1988) (documentary on sex education).

[118] *See, e.g.*, Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988) (*Ulysses*).

[119] *See, e.g., Pacifica Found., Inc.*, 2 FCC Rcd 2698 (play dealing with AIDS and homosexuality), *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[120] *See, e.g., Kansas City Television, Ltd., Order*, FCC 88-274 (released Aug. 5, 1988) (film "Private Lessons").

[121] Letter to Thomas Byrne at 2 n.1. One Commissioner stated that " 'Ulysses' is probably indecent" and that he is "amazed it made it as a classic." Wall St. J., May 26, 1987, at 35, col. 1.

tical guidance to know that they apparently need not fear sanctions if they present a three-hour reading of *Ulysses*, or indeed that other established "works of literature" may be read aloud if the sexual references are dispersed over a three-hour period. It is no answer to suggest that careful study of the Commission's decisions will yield answers to these difficult questions of interpretation. They do not, and many broadcasters are simply unwilling or unable to employ lawyers routinely to attempt to advise them as to the appropriate course of conduct. Thus, despite the government's consistent efforts in its brief to portray the statute as protecting children against pornography, its intent and actual sweep are far broader, a problem compounded by the vagueness of the Commission's definition.

The Second Circuit, like the district court here, has held the Commission's standard unconstitutional.[122] Those rulings were clearly correct. This Court has consistently struck down on vagueness grounds statutes which have sought to regulate indecency, without clearly defining that term. Thus, for example, in *Bantam Books, Inc. v. Sullivan*, the Court held unconstitutional a state law creating a commission that was "to educate the public concerning [materials] containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth. . . ." [123] Finding that the law was unconstitutionally vague and that the commission had not done anything to make it more precise, the Court explained that "[t]he distributor is left to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." [124] Similarly, in *Cohen v. California*, the Court invalidated a conviction imposed for wearing a jacket bearing a four-letter word.[125] The Court concluded that the statute did not put one "on notice that certain kinds of otherwise per-

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[122] *Carlin Communications, Inc.*, 837 F.2d at 558-60.

[123] 372 U.S. at 59.

[124] *Id.* at 71.

[125] 403 U.S. 15 (1971).

missible speech or conduct would nevertheless . . . not be tolerated in certain places." [126] In *Hustler Magazine v. Falwell*, the Court held that a parody which used sexual innuendo was protected speech, noting that a standard of " '[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." [127] The legislation here is similarly unconstitutional because it incorporates an unconstitutionally vague and overbroad definition.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Central District of California invalidating the indecency ban in Section 223(b) should be affirmed.

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[126] *Id.* at 19; *see also Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (summarily vacating and remanding conviction under disorderly persons statute prohibiting use of "offensive," "profane," or "indecent" language in a public place); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (summarily vacating and remanding conviction under statute barring "any obscene or lascivious language or word in any public place or in the presence of females"); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (summarily vacating and remanding conviction under breach of peace statute prohibiting wantonly cursing, reviling, or using "obscene or opprobrious language" towards an on-duty police officer).

[127] 108 S. Ct. at 882.

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